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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSIE HUGHES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
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JESSIE HUGHES,

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APPELLEE'S BRIEF

STATEMENT OF THE CASE AND JURISDICTION

Appellant, Jessie Hughes, was found guilty following a trial by jury on a nine count indictment charging three unlawful sales of heroin in violation of Title 21, United States Code, Section 174, three unlawful concealments of heroin in violation of Title 21, United States Code, Section 174, and three unlawful sales of heroin in violation of Title 26, United States Code, Section 4705(a).

Notice of Appeal was timely filed [T. 41] and leave to proceed in formal pauperis was requested [T. 39]. The trial court denied the request [T. 44]. On August 18, 1968, this court granted leave to proceed in formal pauperis.

Jurisdiction of this court to review the judgment below is predicated on Title 28, United States Code, Section 1291 and 1294.

STATEMENT OF FACTS

On April 5, 1967, Agent William B. Jackson of the Federal Bureau of Narcotics had a conversation on the telephone with an informant named Bill Davis (R. 73-74]. During that conversation, Davis introduced Jackson to a man called "Gizmoe" who told Jackson he had some heroin to sell for \$175 [R. 74]. Later that day Jackson met with "Gizmoe" [R. 77]. "Gizmoe" was the Appellant, Hughes [R. 74-77]. After Davis introduced Jackson to Hughes he left [R. 78], leaving the two men in Jackson's car (R. 77; 93]. Jackson asked Hughes if he had the stuff and Hughes replied "yes" and removed from his mouth a cellophane bag containing fourteen (14) multi-colored balloons which contained tan powder. Jackson told Hughes the price was rather high and Hughes replied, "Well, I will try to do better next time but right now it has to go for \$175.00." Jackson gave Hughes \$175.00 and Hughes got out of the car [R. 78] and entered the informant's house [R. 79]. The informant came out of the house and drove off with Jackson [R. 78.].

On April 10, 1967, Jackson met with the informant and two other agents [R. 82]. Following their conversation, Jackson went to the informant's house, alone. He was admitted to the

house by a woman and once inside met with Hughes. Hughes told Jackson he had a "good deal" for him for \$350.00 and showed him six multi-colored balloons filled with a brown powder. Jackson complained about the price again, to which Hughes replied, "Well, you take this and I am going to give you a good deal the next time, so when I come back from Mexico I will get in touch with you and I will give you a real good deal." Jackson gave Hughes \$350.00 and left [R. 83].

On April 20, 1967, Jackson returned to the informant's residence. Upon entering he met Hughes, who took him to a bathroom and closed the door. Hughes then removed a rubber condom from his pants pocket containing a tan powder and said, "Here is the stuff" [R. 86]. Jackson asked him how much he wanted for it, to which Hughes replied, "One hundred seventy-five dollars. I promised you a deal when I came back from Mexico, this is the best deal I can give you." Jackson gave Hughes \$175.00 and left [R. 87].

The tan powder substance purchased by Jackson from Hughes on the afore related three occasions was identified as heroin by an expert chemist [R. 132-149].

Because of the nature of Hughes' allegations of error in this appeal we recite for the Court's benefit the evidence presented by the defense.

Hughes testified in his own behalf. His substantive testimony of his defense was prefaced by his admissions that he had been convicted of felony burglary [R. 163], shoplifting,

petty theft (he stole a watch from a police officer) [R. 164], and had been arrested some 35 times for being drunk and disorderly [R. 165].

Hughes testified he had known the informant since 1952 [R. 165]. He stated that the informant lived with some prostitutes at the residence where the instant transactions took place [R. 168]. Hughes said he was picked up at his hotel (on skid row [R. 303]) by the informant on April 5, 1967 and told by the informant to give a package of dope to Agent Jackson [R. 170-171]. He gave the package to Jackson who gave him some money which he in turn gave to the informant [R. 171-172]. Hughes testified he executed this transaction at the informant's request because he thought he was going to get \$.50 or \$.65 for a drink or a bottle of wine [R. 172-173]. Hughes stated he drank 3 or 4 quarts of wine a day [R. 173]. He said the informant told him, on April 5, to put the dope in his mouth [R. 173-174].

Hughes admitted talking to Jackson on the phone prior to the transaction on April 5, saying that the informant was present with him during the conversation and told him what to say to Jackson [R. 175]. The phone call to Jackson was made from the informant's house [R. 176].

In Hughes' remaining testimony [R. 179-191] he admitted to the transactions on April 10 and 20 stating that on each occasion he was transported to the informant's house by the informant or one of his girls, that on each occasion the informant gave him the dope to give to Jackson and that he in turn gave all the money he

received to the informant. He admitted saying everything Jackson attributed to him in the course of the three buys, explaining that the informant had told him what to say.

It was established that in December, 1966 or January 1967, the informant was arrested for selling narcotics [R. 209; 211] and, at the time of this trial, federal proceedings were pending against him [R. 211].

The informant testified and denied everything the Appellant had said about his complicity in the sales [R. 207-224].

GOVERNMENT'S COUNTER ARGUMENT NUMBER ONE

(RELATIVE TO APPELLANT'S SPECIFICATION
OF ERROR 1)

DIMINISHED CAPACITY IS NOT A DEFENSE
TO A CRIMINAL CHARGE IN THE NINTH
CIRCUIT JUDICIAL DISTRICT.

STATEMENT

Hughes' contention in this specification of error is that the trial court denied him the right to present a defense - the defense of diminished capacity to formulate the requisite criminal intent [Appellant's Br. 4-8]. The trial court refused to permit Hughes to offer proof that " . . . the defendant is a person of impaired intelligence, he is alcohol motivated, he in Dr. Drury's

opinion probably has brain damage, that he is a person highly susceptible to suggestion, that his judgment as a reasonable man is severely impaired and that as a result of these findings the material proof as to his knowingly acting in violation of the laws of the United States should be considered" [R. 158]. The Court sustained the Government's objection to the offer of proof [R. 159-160] stating:

"If that is the case then he would be incompetent at the time of the offense. Otherwise this is not material at all. If a man is not capable of knowing what he is doing, then he is incompetent" [R. 158].

The Court had, prior to trial, found Hughes competent to stand trial following a psychiatric examination [T. 16].

ARGUMENT

The District Court properly denied the offer of proof. Although the Court spoke in terms of "competency at the time of the act" ^{1/} in denying the offer of proof it is clear that the Court was speaking in terms of mental "responsibility" at the time of

^{1/} The question of a defendant's mental competency is relevant only to his mental ability at the time of trial. "[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.' " Dusky v. United States, 1960, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788.

the act. The question of the defendant's competency was not in issue, it having been theretofore determined by the Court that the defendant was competent to stand trial. When the Court stated "If a man is not capable of knowing what he is doing, then he is incompetent," the Court was clearly speaking in terms of mental irresponsibility for the commission of crime. The only defense available to an accused in this Circuit which relates to such irresponsibility is the M'Naghton defense. Sauer v. United States, 9 Cir. 1957, 241 F.2d 640, cert. denied, 354 U.S. 940. No defense of mental irresponsibility less than that of the M'Naghton test, such as diminished capacity, may be relied upon. Ramer v. United States, 9 Cir. 1968, 390 F.2d 564. The Court therefore properly rejected the proffered defense because in defense counsel's own words it did not nor did it purport to measure up to the M'Naghton standard.

Furthermore, to argue, as does Hughes, that evidence of diminished capacity should be admitted as bearing on the intent with which he acted is to argue the inapposite. Even under the California state law of diminished capacity, the defense is but a partial defense available only to a defendant charged with a crime in which the state of mind with which he acted is determinative of the degree of the offense committed. See Brubaker v. Dickson, 9 Cir. 1962, 310 F.2d 30, reviewing California law on diminished capacity. The only intent for which the defendant herein was held charged was "the doing of an act which the law forbids intending with evil motive or bad purpose to disobey or to disregard the law"

[R. 263]. There are no greater or lesser degrees of intent involved in the instant offense. Thus, had the proffered testimony been received and believed by the jury, acquittal could have followed based on criminal irresponsibility of a standard less than M'Naghton for there was no lesser degree of the crime charged relative to a lesser intent. This would have clearly violated the holdings of Sauer and Ramer.

Furthermore, following the denial of the offer of proof, Hughes took the stand and admitted all the elements of the offense, including knowledge of the narcotic content of the packages sold to Jackson [R. 170-171].

We submit that under the circumstances there was no error.

GOVERNMENT'S COUNTER ARGUMENT NUMBER TWO

(RELATIVE TO APPELLANT'S SPECIFICATION OF ERROR II)

HUGHES WAS NOT PREJUDICED BY THE COURT'S REFUSAL TO PERMIT HIM TO INTERROGATE THE NARCOTIC AGENT AS TO THE INFORMANT'S MOTIVE FOR THE REASON THAT THE QUESTION POSED TO THE AGENT WAS THEREAFTER ASKED OF AND ANSWERED BY THE INFORMANT HIMSELF.

STATEMENT

Hughes claims prejudice because the trial court would not permit him to ask the narcotic agent if the federal narcotics case against the informant for selling narcotics was still pending or if it had been disposed of [R. 92-93]. He asserts that his right to show the informant's motive relative to his claimed entrapment was thereby infringed.

However, the informant did testify and on direct examination by defense counsel the following took place:

Q. "As a result of that arrest, have proceedings been lodged against you in any court of the State of California or Central District of California?

A. "I don't quite understand you. . . .

Q. "Is there any proceeding pending against you?

A. "Yes, there is.

- Q. "In the State or where?
- A. "Here in California.
- Q. "A federal court or a state court?
- A. "Federal court, up here in this building"
- [R. 210-211].

ARGUMENT

The answer sought by Hughes from the agent was completely answered by the informant himself and therefore Hughes is in no position to claim prejudice.

GOVERNMENT'S COUNTER ARGUMENT NUMBER THREE (RELATIVE TO APPELLANT'S SPECIFICATION OF ERROR III)

THE GIVING OF THE ENTRAPMENT INSTRUCTIONS
STUCK DOWN IN NOTARO v. UNITED STATES IS
NOT PREJUDICIAL ERROR IN THE ABSENCE OF
AN OBJECTION ON BEHALF OF THE DEFENDANT.

STATEMENT

The trial court instructed the jury on entrapment [R. 275-277]. This was the same instruction struck down by this Court in Notaro v. United States, 9 Cir. 1966, 363 F.2d 169. The defendant at no point objected to the giving of that instruction.

ARGUMENT

The failure to object to the giving of the Notaro instruction does not give rise to "plain error" under Rule 52(b), F. R. Cr. P., 18 U S. C., where the issue of entrapment is not a close question. Smith v. United States, 9 Cir. 1968, 390 F.2d 401; cf. Nordeste v. United States, 9 Cir. 1968, 393 F.2d 335, 339-340; Robison v. United States, 9 Cir. 1967, 379 F.2d 338, 345. Even assuming the truthfulness of Hughes' testimony at trial, the question of entrapment is not a close one. The very readiness and ease with which the Hughes agreed to commit the offenses herein is most sufficient to warrant rejection of his claim of entrapment. United States v. Sherman, 2 Cir. 1952, 200 F.2d 880 882.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be in all things affirmed.

Respectfully submitted,

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